

AMENDED IN ASSEMBLY MAY 2, 2007

AMENDED IN ASSEMBLY MARCH 28, 2007

CALIFORNIA LEGISLATURE—2007–08 REGULAR SESSION

## ASSEMBLY BILL

**No. 916**

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**Introduced by Assembly Member Niello**  
(Principal coauthor: Senator Cox)

February 22, 2007

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An act to add and repeal Section 20133.1 of the Public Contract Code, relating to public contracts.

### LEGISLATIVE COUNSEL'S DIGEST

AB 916, as amended, Niello. Public contracts: alternative procurement procedure: County of Sacramento.

Existing law requires public entities to comply with certain procedures in soliciting and evaluating bids and awarding contracts for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement.

This bill would declare the intent of the Legislature to authorize an alternative method of procurement for airport-related construction projects in the County of Sacramento. This bill would authorize the County of Sacramento to use the construction manager at-risk method, as defined, for contracting on airport-related construction projects, as specified. This bill would establish a procedure for the submission and evaluation of bids, as specified. ~~This bill would also require the County of Sacramento to submit a report, as specified, to the Legislative Analyst's Office if it utilizes this alternative method of procurement.~~

This bill would require a construction manager, as defined, to implement a labor compliance program for projects utilizing the

construction manager at-risk method. The bill also would make legislative findings and declarations as to the necessity of a special statute for the County of Sacramento.

~~This bill would require specified information to be verified under oath, thus imposing a state-mandated local program by expanding the scope of an existing crime.~~

~~The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.~~

~~This bill would provide that no reimbursement is required by this act for a specified reason.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~yes~~*no*. State-mandated local program: ~~yes~~*no*.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 20133.1 is added to the Public Contract
- 2 Code, to read:
- 3 20133.1. (a) This section provides for an alternative
- 4 procurement procedure for building construction projects applicable
- 5 only to airport-related construction in the County of Sacramento
- 6 subject to approval of the board of supervisors.
- 7 (b) (1) It is the intent of the Legislature to enable the utilization
- 8 of a construction manager at-risk~~project~~ method as a cost-effective
- 9 option for building and modernizing public facilities on a limited
- 10 and pilot basis. It is not the intent of the Legislature to authorize
- 11 this procedure for facilities unrelated to airport improvement.
- 12 (2) The Legislature finds and declares that utilizing a
- 13 construction manager at-risk~~project~~ method requires a clear
- 14 understanding of the roles and responsibilities of each participant
- 15 in the process. The Legislature also finds that cost-effective benefits
- 16 are achieved by shifting the liability and risk for cost containment
- 17 and project schedule to the construction manager and by permitting
- 18 the coherent phasing of projects into discrete contract increments.
- 19 (3) The construction manager at-risk method may be used, but
- 20 is not limited to, when it is anticipated that it will reduce project
- 21 costs or expedite project completion in a manner that is not
- 22 achievable through the design-bid-build method.
- 23 (4) If the board of supervisors elects to proceed under this
- 24 section, the board of supervisors shall establish and enforce a labor

1 compliance program containing the requirements outlined in  
2 Section 1771.5 of the Labor Code, or it shall contract with a third  
3 party to operate a labor compliance program containing the  
4 requirements outlined in Section 1771.5 of the Labor Code. This  
5 requirement shall not apply to any project where the county or the  
6 construction manager has entered into any collective bargaining  
7 agreement or agreements that bind all of the contractors performing  
8 work on the projects.

9 (c) As used in this section:

10 (1) "Construction manager at-risk method" means a project  
11 delivery method in which there is a separate contract for  
12 construction services and a separate contract for design services.  
13 The contract for construction services may be entered into at the  
14 same time as the contract for design services, or at a later time.  
15 The execution of the design and the construction of the project  
16 may be in sequential phases or concurrent phases.

17 (2) "Construction manager" means a partnership, corporation,  
18 or other legal entity that is able to provide appropriately licensed  
19 contracting and engineering services as needed pursuant to a  
20 construction manager at-risk contract.

21 (3) "County" means the County of Sacramento.

22 (4) "Project" means the construction of a building and  
23 improvements directly related to improvements of a public,  
24 commercial airport in the County of Sacramento.

25 (d) Construction manager at-risk method projects shall progress  
26 as follows:

27 (1) (A) The county shall establish a procedure for the evaluation  
28 and selection of a construction manager through a request for  
29 qualifications ~~(RFQ)~~ (RFQ). The RFQ shall include, but not be  
30 limited to, the following:

31 (i) If the entity is a partnership, limited partnership, or other  
32 association, a listing of all of the partners, general partners, or  
33 association members known at the time of the bid submission who  
34 will participate in the construction manager at-risk method contract,  
35 including, but not limited to, mechanical subcontractors.

36 (ii) Evidence that the members of the entity have completed, or  
37 demonstrated the experience, competency, capability, and capacity  
38 to complete, projects of similar size, scope, or complexity, and  
39 that proposed key personnel have sufficient experience and training  
40 to competently manage and complete the construction of the

1 project, as well as a financial statement that assures the county  
2 that the entity has the capacity to complete the project, construction  
3 expertise, and an acceptable safety record.

4 (iii) The licenses, registration, and credentials required to  
5 construct the project, including information on the revocation or  
6 suspension of any license, ~~credential, or registration~~ *registration,*  
7 *or credential.*

8 (iv) Evidence that establishes that the entity has the capacity to  
9 obtain all required payment and performance bonding, liability  
10 insurance, and errors and omissions insurance.

11 (v) Any prior serious or willful violation of the California  
12 Occupational Safety and Health Act of 1973, contained in Part 1  
13 (commencing with Section 6300) of Division 5 of the Labor Code,  
14 or the federal Occupational Safety and Health Act of 1970 (Public  
15 Law 91-596), settled against any member of the entity, and  
16 information concerning workers' compensation experience history  
17 and worker safety program.

18 (vi) Information concerning any debarment, disqualification,  
19 or removal from a federal, state, or local government public works  
20 project. Any instance in which an entity, its owners, officers, or  
21 managing employees submitted a bid on a public works project  
22 and were found to be nonresponsive, or were found by an awarding  
23 body not to be a responsible bidder.

24 (vii) Any instance in which the entity, or its owners, officers,  
25 or managing employees, defaulted on a construction contract.

26 (viii) Any violations of the Contractors' State License Law  
27 (Chapter 9, commencing with Section 7000) of Division 3 of the  
28 Business and Professions Code), excluding alleged violations of  
29 federal or state law including the payment of wages, benefits,  
30 apprenticeship requirements, or personal income tax withholding,  
31 or of Federal Insurance Contributions Act (FICA; 26 U.S.C. Sec.  
32 3101 et seq.) withholding requirements settled against any member  
33 of the entity.

34 (ix) Information concerning the bankruptcy or receivership of  
35 any member of the entity, including information concerning any  
36 work completed by a surety.

37 (x) Information concerning all settled adverse claims, disputes,  
38 or lawsuits between the owner of a public works project and any  
39 member of the entity during the five years preceding submission  
40 of a bid pursuant to this section, in which the claim, settlement, or

1 judgment exceeds fifty thousand dollars (\$50,000). Information  
2 shall also be provided concerning any work completed by a surety  
3 during this period.

4 (xi) In the case of a partnership or other association that is not  
5 a legal entity, a copy of the agreement creating the partnership or  
6 association and specifying that all partners or association members  
7 agree to be fully liable for the performance under the contract.

8 (xii) For the purposes of this paragraph, a construction  
9 manager's "safety record" shall be deemed "acceptable" *if* his or  
10 her experience modification rate for the most recent three-year  
11 period is an average of 1.00 or less, and his or her average ~~Total~~  
12 ~~Recordable Injury/Illness~~ *total recordable injury/illness* rate and  
13 average lost work rate for the most recent three-year period does  
14 not exceed the applicable statistical standards for its business  
15 category or if the construction manager is a party to an alternative  
16 dispute resolution system as provided for in Section 3201.5 of the  
17 Labor Code.

18 (B) The information required pursuant to this subdivision ~~shall~~  
19 ~~be verified under oath by the entity and its members in the manner~~  
20 ~~in which civil pleadings in civil actions are verified. Information~~  
21 that is not a public record pursuant to the California Public Records  
22 Act (Chapter 3.5 (commencing with Section 6250) of Division 7  
23 of Title 1 of the Government Code) shall not be open to public  
24 inspection.

25 (2) (A) For each contract included in the request for  
26 qualifications, the county shall then enter into separate negotiations  
27 for the contract with the highest qualified person or firm on the  
28 final list for that contract. However, if the request for qualifications  
29 is for multiple contracts and specifies that all of the multiple  
30 contracts will be awarded to a single construction manager, there  
31 may be a single negotiation for all of the multiple contracts. The  
32 negotiations shall include consideration of compensation and other  
33 contract terms that the county determines to be fair and reasonable  
34 to the county. In making this decision, the county shall take into  
35 account the estimated value, ~~the scope, the complexity, and the~~  
36 ~~nature of the professional services or construction services to be~~  
37 ~~rendered. If the county is not able to negotiate a satisfactory~~  
38 ~~contract with the highest qualified person or firm on the final list,~~  
39 ~~regarding compensation and on other contract terms the county~~  
40 ~~determines to be fair and reasonable, the county shall formally~~

1 terminate negotiations with that person or firm. The county may  
2 undertake negotiations with the next most qualified person or firm  
3 on the final list in sequence until an agreement is reached or a  
4 determination is made to reject all persons or firms on the final  
5 list.

6 (B) If a contract for construction services is entered into pursuant  
7 to this section and includes preconstruction services by the  
8 construction manager, the county shall enter into a written contract  
9 with the construction manager for preconstruction services under  
10 which contract the county shall pay the construction manager a  
11 fee for preconstruction services in an amount agreed upon by the  
12 county and the construction manager. The preconstruction services  
13 contract may include fees for services to be performed during the  
14 contract period; provided, however, the county shall not request  
15 or obtain a fixed price or a guaranteed maximum price for the  
16 construction contract from the construction manager or enter into  
17 a construction contract with the construction manager until after  
18 the county has entered into a services contract. Every  
19 ~~preconstructions~~ *preconstruction* services contract shall provide  
20 for the subsequent negotiation for construction of all or any discreet  
21 phase or phases of the project.

22 (C) Construction shall not commence on any phase, package,  
23 or element until the county and construction manager agree in  
24 writing on either a fixed price that the county will pay for the  
25 construction to be commenced or a guaranteed maximum price  
26 for the construction to be commenced and construction schedule  
27 for the project. The construction manager shall not perform more  
28 than 15 percent of the work covered by the fixed price or  
29 guaranteed maximum price agreement reached. Work that is not  
30 performed directly by the construction manager shall be bid to  
31 subcontractors pursuant to subdivision (f).

32 (e) (1) Any construction manager that is selected to construct  
33 a project pursuant to this section shall possess or obtain sufficient  
34 bonding to cover the contract amount for construction services,  
35 and such risk and liability insurance as the county may require.

36 (2) Any payment or performance bond written for the purposes  
37 of this section shall be written using a bond form developed by  
38 the county.

39 (f) All subcontractors bidding on contracts pursuant to this  
40 section shall be afforded the protections contained in Chapter 4

1 (commencing with Section 4100) of Part 1. The construction  
2 manager at-risk shall do all of the following:

3 (1) Provide public notice of the availability of work to be  
4 subcontracted in accordance with the publication requirements  
5 applicable to the competitive bidding process of the county.

6 (2) Provide a fixed date and time on which the subcontracted  
7 work will be awarded in accordance with the procedure established  
8 pursuant to this section.

9 (3) Comply with any subcontracting procedures adopted by the  
10 county that were included in the county's ~~Request for~~  
11 ~~Qualifications~~ *RFQ*. If the county has adopted procedures to  
12 prequalify public works contractors, the construction manager may  
13 use the procedures to prequalify subcontractors.

14 (g) The county may retain the services of a design professional  
15 or construction project manager, or both, throughout the course of  
16 the project in order to ensure compliance with this section.

17 (h) Contracts awarded pursuant to this section shall be valid  
18 until the project is completed.

19 (i) Nothing in this section is intended to affect, expand, alter,  
20 or limit any rights or remedies otherwise available at law.

21 (j) (1) If the county elects to award a contract for a construction  
22 project pursuant to this section, retention proceeds withheld by the  
23 county from the entity shall not exceed 5 percent if a performance  
24 and payment bond, issued by an admitted surety insurer, is required  
25 in the solicitation of bids.

26 (2) In a contract between the construction manager and the  
27 subcontractor and in a contract between a subcontractor and any  
28 subcontractor thereunder, the percentage of the retention proceeds  
29 withheld may not exceed the percentage specified in the contract  
30 between the county and the construction manager. If the  
31 construction manager provides written notice to any subcontractor  
32 who is not a member of the construction manager, prior to or at  
33 the time the bid is requested, that a bond may be required and the  
34 subcontractor subsequently is unable or refuses to furnish a bond  
35 to the construction manager, then the construction manager may  
36 withhold retention proceeds in excess of the percentage specified  
37 in the contract between the county and the construction manager  
38 from any payment made by the construction manager to the  
39 subcontractor.

~~(k) If the county that elects to proceed under this section and uses the construction manager at-risk method on a public works project, the county shall submit to the Legislative Analyst's Office before December 1, 2012, a report containing a description of each public works project procured through the construction manager at-risk process and completed after November 1, 2008, and before November 1, 2012. The report shall include, but not be limited to, all of the following information:~~

- ~~(1) The type of project.~~
- ~~(2) The gross square footage of the project.~~
- ~~(3) The entity that was awarded the project.~~
- ~~(4) The estimated and actual length of time to complete the project.~~
- ~~(5) The estimated and actual project costs.~~
- ~~(6) A description of any written protests concerning any aspect of the solicitation, bid, proposal, or award of the project, including the resolution of the protests.~~
- ~~(7) An assessment of the prequalification process and criteria.~~
- ~~(8) An assessment of the effect of retaining 5-percent retention on the project.~~
- ~~(9) A description of the Labor Force Compliance Program and an assessment of the project impact, where required.~~
- ~~(10) An assessment of the most appropriate uses for the construction manager at-risk approach.~~

~~(l) If the county elects not to use the authority granted by this section, it may submit a report to the Legislative Analyst's Office explaining why the county elected to not use the construction manager at-risk method.~~

~~(m) On or before January 1, 2013, the Legislative Analyst shall report to the Legislature on the use of the construction manager at-risk method by counties pursuant to this section, including the information listed in subdivision (k). The report may include recommendations for modifying or extending this section.~~

~~(n) Except for the reporting requirements, this section shall~~

~~(k) This section shall remain in effect only until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date.~~

SEC. 2. The Legislature finds and declares that a special law is necessary and that a general law cannot be made applicable within the meaning of Section 6 of Article XIII B of the California



1 Constitution because of a unique need to construct airport-related  
2 buildings in the County of Sacramento.

3 ~~SEC. 3. No reimbursement is required by this act pursuant to~~  
4 ~~Section 6 of Article XIII B of the California Constitution because~~  
5 ~~the only costs that may be incurred by a local agency or school~~  
6 ~~district will be incurred because this act creates a new crime or~~  
7 ~~infraction, eliminates a crime or infraction, or changes the penalty~~  
8 ~~for a crime or infraction, within the meaning of Section 17556 of~~  
9 ~~the Government Code, or changes the definition of a crime within~~  
10 ~~the meaning of Section 6 of Article XIII B of the California~~  
11 ~~Constitution.~~